

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11 Bankruptcy

Intrepid U.S.A., Inc.,
and Jointly Administered Cases,

Case No. 04-40416-NCD

Case No. 04-40462-NCD

Case No. 04-40418-NCD

Debtors

Case Nos. 04-41924 – 04-41988-NCD

**DEBTORS' OBJECTION TO MONTANA FRANCHISEES' MOTION (1) TO REQUIRE
ASSUMPTION OR REJECTION OF EXECUTORY CONTRACTS, (2) TO COMPEL
TIMELY PERFORMANCE UNDER FRANCHISE AGREEMENTS, AND (3) TO
GRANT ADMINISTRATIVE EXPENSE PRIORITY FOR POST-PETITION
AMOUNTS DUE UNDER FRANCHISE AGREEMENTS**

INTRODUCTION

Intrepid Affiliates, Inc. and its affiliated entities ("Debtors") object to Janet and Allen Hawley, TKO Stat, Inc., and InWest, Inc.'s ("Montana Franchisees") motion to compel Debtors to assume or reject the Franchise Agreements by September 30, 2004. The Montana Franchisees fail to show that they have incurred any damages beyond the compensation available under the Bankruptcy Code. The Franchise Agreements are vital to Debtors' reorganization as it provides them with a steady stream of cash flow and represent a significant portion of their estates. Moreover, the Debtors have not had sufficient time to evaluate their financial situation and the potential value of their assets including the Franchise Agreements in formulating plans as evidenced by this Court's recent extension of the exclusivity periods. Finally, the Debtors need time to determine any cure amount due the Montana Franchisees, and it appears that, based on the unsubstantiated damage claims of the movants, discovery and an evidentiary hearing will be necessary for the Court to determine any cure amount. Debtors have served discovery on the Montana Franchisees to discern the factual basis of the Montana Franchisees' assertion that

Debtors have breached the Franchise Agreements and obtain an itemization of the alleged damages incurred. But those issues cannot be resolved by September 30, 2004. Thus, the Court should deny the Montana Franchisees' motion.

BACKGROUND

I. DEBTORS PURCHASED THE FRANCHISE AGREEMENTS FROM WESTERN MEDICAL SERVICES, INC.

The Montana Franchisees entered into Franchise Agreements with Western Medical Services, Inc. or its predecessor ("Western Medical") in 1991 and 1998. Under these Franchise Agreements, Western Medical granted the Montana Franchisees an exclusive franchise to operate a healthcare supplemental staffing service and home care agency in Yellowstone County (Billings) and Flathead County (Kalispell), Montana. Unsworn Declaration of Gregory Von Arx ("Von Arx Decl.") ¶ 2.

In August 1999, Debtors purchased the assets of Western Medical, including Western Medical's rights as franchisor under the Franchise Agreements with the Montana Franchisees.¹ In January 2002, Debtors acquired another existing home healthcare business in Montana. In accordance with the terms of the existing Franchise Agreements with the Montana Franchisees, Debtors offered them the opportunity to operate a healthcare supplemental staffing service and home care agency under an exclusive franchise for additional territories in Montana. The Montana Franchisees accepted that offer and, since that time, these additional territories have been operated in accordance with the terms of the Franchise Agreements. *Id.* at ¶¶ 2-3.

¹ The Franchise Agreements have never been amended to reflect the acquisition by Debtors. Nevertheless, the parties have treated references to Western Medical in the Franchise Agreements as references to Debtors.

II. THE STRUCTURE OF THE FRANCHISE AGREEMENTS.

Under the Franchise Agreements, the Debtors provide the Montana Franchisees an exclusive franchise to operate a healthcare supplemental staffing service and home care agency in a number of territories in Montana. Debtors own all of the Medicare and Medicaid provider numbers and the parties to the underlying provider agreements necessary to obtain payment for services rendered under the government Medicare and Medicaid programs. In addition, Debtors hold the government issued certificates of need as required by the State of Montana to operate such an agency. The Debtors employ all field staff that provide care to patients. The Montana Franchisees employ and supervise administrative staff and the individual owners are required to work in the business. The Montana Franchisees and their administrative staff are responsible for overseeing the day-to-day operations, including supervising the field staff and entering billing information into a centralized billing system referred to as the McKesson Software System. This system is used by Debtors across all of their businesses to provide billing, financial and accounting, collections and other functions vital to the operation of the businesses.

Based on information the Montana Franchisees' employees enter into the McKesson Software System, bills for services rendered are reviewed by Debtors for plain errors. Debtors then send the bills to the customers. If the bills contain errors, they are sent to the Montana Franchisees for reconciliation. All cash receipts are directed to the Debtors' lockboxes. The Debtors enter the receipts into the McKesson Software System and reconcile collections to the billings. Unsworn Declaration of Thomas Geary ("Geary Decl.") ¶ 3.

Because Debtors employ all field staff, Debtors pay payroll and benefit expenses of the field staff as direct employees or independent contractors of Debtors. Moreover, all accounts

receivables and cash collections are Debtors' property. Unsworn Declaration of Don Lamoreaux ("Lamoreaux Decl.") ¶ 4(D).

It can take sixty or more days to collect a receivable. Id. Nevertheless, at the end of each four-week accounting period,² Debtors advance to the Montana Franchisees the gross profits. The gross profits are the gross billings of the Montana Franchisees less payroll and other direct labor expenses and certain other expenses paid by the Debtors and less the Debtors' service fee, which is 8% of the gross sales. Significantly, the payment to the Montana Franchisees is an advance based on gross sales; the payment is not based on collections. Since Debtors' purchase of the assets of Western Medical, this advance has been sent via Federal Express to the Montana Franchisees or their banks on the Tuesday following two weeks after the close of the fiscal period. The financial information is e-mailed to the franchisees concurrently. Id.; Von Arx Decl. ¶ 4.

Because the payment to the Montana Franchisees is an advance based on gross sales, the Franchise Agreements provide a scheme for addressing amounts that may never be collected. In fact, the Franchise Agreements provide that the payment to the Montana Franchisees is subject to recoupment for bad debts:

The periodic remittances to you [Montana Franchisees] are subject to the collectibility of Western's [Debtors'] customer accounts in a timely manner.

Franchise Agreement ¶ 5(d). Indeed, in the event that a bill is unpaid after 113 days, that amount is deducted from the payment due to the Montana Franchisees. Franchise Agreement ¶ 5(j).

² Debtors' accounting periods are divided into thirteen four-week periods per year that roughly correspond to calendar months.

III. IN THE FALL OF 1999, ALL OF WESTERN MEDICAL'S FORMER FRANCHISEES Banded TOGETHER AND THREATENED TO SUE THE DEBTORS AND UNILATERALLY TERMINATE THE FRANCHISE AGREEMENTS.

As noted above, Debtors purchased the assets of Western Medical in August 1999. Shortly after the closing on the purchase, a number of the franchisees, including the Montana Franchisees, banded together and threatened to sue Debtors and unilaterally terminate the Franchise Agreements for complaints they had with Western Medical. The Montana Franchisees also complained that Debtors were not providing additional services that Western apparently provided but were not called for under the Franchise Agreements. At that time, Debtors had met their obligations under the Franchise Agreements. Nevertheless, the business the Debtors acquired from Western Medical was losing substantial amounts of money and the Debtors were in the process of turning it around. The 8% service fee was a major source of funds that Debtors depended on until the turn-around of the business could be completed. Because the franchisees threatened to terminate the agreements and the crippling effect they would have on these recently acquired business, the Debtors offered a substantially discounted buy-out price to all of Western Medical's former franchisees. The vast majority of them accepted the offer. The Montana Franchisees did not. Instead, they elected to continue on as franchisees, bound by the terms of the Franchise Agreements. Von Arx Decl. ¶¶ 5-6.

ARGUMENT

I. THE MONTANA FRANCHISEES FAIL TO SHOW THAT THE TIME IN WHICH THE DEBTORS HAVE TO ASSUME OR REJECT THE FRANCHISE AGREEMENTS SHOULD BE REDUCED.

A. Franchise Agreements Are Executory Contracts Assumable At Any Time Until Confirmation.

11 U.S.C. § 365(d)(2)³ provides that a debtor in possession may assume or reject an executory contract “at any time before confirmation of the plan.” A party to an executory contract may move the court to order the debtor to determine within a specified period of time whether to assume or reject the executory contract. Id.; see also Fed. R. Bankr. P. 6006(b). Because section 365(d)(2) provides the debtor with an important right, the party to such an executory contract bears the burden of proving that the time in which the debtor has to assume or reject the executory contract should be reduced. In re Republic Technologies International, LLC, 267 B.R. 548, 554 (Bankr. N.D. Ohio 2001).

The determination of whether the time period to assume or reject should be reduced is made on a case-by-case basis in light of the broad purposes of the entire Bankruptcy Code. In re Teligent, Inc., 268 B.R. 723, 738 (Bankr. S.D.N.Y. 2001). The relevant considerations include:

- the damage that the non-debtor will suffer beyond the compensation available under the Bankruptcy Code;
- the importance of the contract to the debtor’s business and reorganization;

³ 11 U.S.C. § 365(d)(2) provides:

The trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of plan; but the court, on the request of a party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

- whether the debtor has had sufficient time to appraise its financial situation and the potential value of its assets in formulating a plan; and
- whether exclusivity has terminated.

Id. at 738.

Above all, the court should make this determination based on the “broad purpose of Chapter 11, which is ‘to permit successful rehabilitation of debtors.’” In re Dunes Casino Hotel, 63 B.R. 939, 949 (D. N.J. 1986) (quoting NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984)). Indeed, as long as the debtor continues to perform its post-petition obligations under the executory contract, the time in which the debtor has to assume or reject the executory contract should not be accelerated. In re O-Jay Foods, Inc., 110 B.R. 895, 898 (Bankr. D. Minn. 1989). Rather, as expressly provided by section 365(d)(2), the debtor’s decision can be deferred until it is embodied in a plan and presented to the court and creditors at the confirmation hearing. Id.

The Montana Franchisees fail to show that the time in which the Debtors have to move to assume or reject the Franchise Agreements should be reduced. The Montana Franchisees do not assert that they have incurred any damages that cannot be compensated under the Bankruptcy Code. In any event, the only damages the Montana Franchisees have incurred are pre-petition damages arising from Debtors’ failure to make advances in the pre-petition period. But for the filing of the Chapter 11 cases on April 12, 2004, the Debtors would have made these payments. Moreover, the Franchise Agreements are vital to the Debtors’ reorganization as they provide a steady stream of cash flow and the sales are a significant source of revenue. As this Court recognized in granting the Debtors’ motion to extend the exclusivity periods, the Debtors have not had sufficient time to appraise their financial situation and the potential value of their assets including the Franchise Agreements in formulating plans.

Moreover, if Debtors are forced to reject the Franchise Agreements, it would cause harm to the Montana Franchisees, the Debtors, and their patients. The Debtors own all of the Medicare and Medicaid provider numbers and certificates of need necessary to obtain payment for services rendered. Should Debtors reject the Franchise Agreements, the Montana Franchisees would no longer be able to obtain payment for services rendered under the provider numbers. Further, Debtors would be forced to terminate a number of employees who would no longer be needed to provide services to the Montana Franchisees. But most importantly, home health services to patients will abruptly cease. Many of these patients require daily visits or administration of medications without which their lives may be in danger. Many patients also have no alternative qualified home care provider that could provide the services currently provided under the Franchise Agreements by Montana Franchisees and the Debtors. Even if the patients find alternative care, they will have experienced a disruption in their service because they will have to adjust to a new home healthcare agency and individuals providing their care. Therefore, the Montana Franchisees' motion should be denied and, in accordance with section 365(d)(2), the Debtors should be entitled to assume or reject the Franchise Agreements until confirmation of plans.

B. The Montana Franchisees Fail To Show That They Have Incurred Any Damages Beyond Those Compensable Under The Bankruptcy Code.

One of the factors in determining whether to reduce the time is whether the party to the executory contract will suffer damages that cannot be compensated under the Bankruptcy Code. In re Teligent, Inc., 268 B.R. at 738. Monetary damages compensable as either an administrative expense claim or as a pre-petition unsecured claim are not the damages contemplated by this factor. In re Ernst Home Center, Inc., 221 B.R. 243, 256 (B.A.P. 95h Cir.

1998). Instead, the party to such an executory contract must show prejudice beyond non-payment of a pecuniary damage. In re Teligent, Inc., 268 B.R. at 739.

As to this factor, the Montana Franchisees allege a number of “defaults” under the Franchise Agreements. As a result of these alleged “defaults,” the Montana Franchisees allege to have incurred non-quantified pre-petition damages in the amount of “not less than \$229,235.01” and post-petition damages that “total approximately \$25,000 per month.” Affidavit of Janet Hawley and Allen Hawley (“Hawley Aff.”) ¶¶ 8 and 9(K). As noted above, however, pre-petition and post-petition damages are damages compensable under the Bankruptcy Code. Because the Montana Franchisees have not asserted any damages that cannot be compensated under the Bankruptcy Code, this factor weighs in the Debtors’ favor.

Even assuming the Montana Franchisees asserted pre-petition and post-petition damages are relevant to this Court’s determination, the Montana Franchisees fail to show that the time in which Debtors have to assume or reject the Franchise Agreements should be reduced. Debtors acknowledge that the Montana Franchisees have a pre-petition claim in the amount of \$229,235.01. This amount comprises the gross profit payments the Montana Franchisees were entitled to before April 12 – the date Intrepid Affiliates, Inc. and sixty-four related entities filed Chapter 11 petitions. But for the filing of the Chapter 11 cases on April 12, the Montana Franchisees would have been paid \$229,235.01. Von Arx Decl. ¶¶ 7-8. Debtors dispute that there is any other default under the Franchise Agreements. Debtors have fully performed all obligations under the Franchise Agreements post-petition. The Montana Franchisees fail to state with any particularity the Debtors’ alleged post-petition breaches and the resulting damages. As shown below, at a bare minimum, there is a fact dispute concerning such claims. Such a fact dispute will require an evidentiary hearing to resolve.

1. Workers compensation coverage

The Montana Franchisees assert that the Debtors are overcharging them for workers compensation coverage, apparently on a pre-petition and post-petition basis. Hawley Aff. ¶ 9(A). Specifically, the Montana Franchisees assert that the rate available in Montana is \$7.56 per \$1,000 of payroll and that Debtors have been charging them \$14.30 per \$1,000 of payroll. Id. As a result, they seek the difference between these rates – approximately \$664,000. Id. This assertion is made without reference to the Franchise Agreements.

The Franchise Agreements provide that Debtors shall be reimbursed for workers compensation coverage costs they incur, not what the Montana Franchisees could obtain elsewhere. Franchise Agreement ¶ 5(e). Moreover, the Debtors actually charge the franchisees for workers compensation premium at rates less than the cost that Debtors incur in obtaining such insurance for their own locations. Debtors' workers compensation premium is set by multiplying the state-mandated annual premium by the MOD (a comparison of a company's workers compensation losses with those of businesses engaged in similar types of work). Premium costs are allocated to each of the Debtors' office (including the corporate and franchise offices) as a percentage of each office's payroll to total payroll for all of the Debtors. The Montana Franchisees' operations constitute 4% of Debtors' total payroll. Therefore, the Montana Franchisees are allocated 4% of premium costs. However, historically, because Debtors were self-insured, each office's actual claims experience is a true reflection of the insurance cost. In the case of the Montana Franchisees, their 4% of payroll accounts for approximately 25% of all claims paid by Debtors under the policies. Indeed, if the premium were calculated based on losses associated with claims (which has been Debtors' costs for the insurance), Debtors are undercharging the Montana Franchisees by approximately \$860,000. Von Arx Decl. ¶ 9(A).

Moreover, in reaching their damage calculation of \$664,000, the Montana Franchisees have not applied the MOD factor in calculating the workers compensation premium. Information made available from Debtors' workers compensation broker and the NCCI indicate that the MOD factor for the Montana Franchisees is 1.9, and this is the MOD factor applied by Debtors. Id.

Significantly, this is not the first time the Montana Franchisees have complained about their premium charges. In the past, Debtors have offered to deviate from the Franchise Agreements to allow the franchisees to purchase coverage. Debtors understand that the Montana Franchisees have chosen to remain on the current policy presumably because they could not find less expensive coverage. Id.

2. General liability insurance

The Montana Franchisees also assert that Debtors are overcharging them for general liability insurance based upon their comparison of "other rates available in Montana." Hawley Aff. ¶ 9(B). As a result, they seek the difference between these alleged rates. Id. Moreover, the Montana Franchisees assert they have not been provided with copies of liability insurance policies. Id.

The Franchise Agreements provide Debtors shall be reimbursed for the general liability insurance costs they incur. Franchise Agreement ¶ 5(e). As with workers compensation coverage, Debtors utilize a consistent approach (and the same approach used by Western Medical) when calculating what to charge each location, whether company-owned or franchised. Von Arx Decl. ¶ 9(B). Indeed, all of the offices are covered under the same policy. Id. Because the Montana Franchisees have failed to produce any evidence of (or even allege) what the comparable Montana rate is, Debtors cannot specifically refute the assertion that they are

overcharging the Montana Franchisees for general liability insurance. Nonetheless, Debtors make a concerted effort to obtain appropriate coverage at a reasonable cost.

Finally, the Montana Franchisees are aware of what liability coverage exists as they have been provided the same evidence of insurance that is provided to each of Debtors' locations. Id. Moreover, particular accounts require certificates of insurance. Id. In order to provide services, evidence of insurance must be provided to the account, and the Montana Franchisees are often provided with this evidence at the time they are provided with a copy of the executed account contract. Id.

3. Billing

The Montana Franchisees assert that the Debtors have billed "some bills inaccurately" and "others not at all." Hawley Aff. ¶ 9(C). They also assert that some bills were billed accurately and collected but the billing software did not account for the payment. Id. Finally, the Montana Franchisees assert Debtors wrongfully deducted from payments of the gross profits "bad debts that are not bad debts." Id.

The Franchise Agreements provide that Debtors shall have the sole right to bill and receive reimbursements from all clients and customers. Franchise Agreement ¶ 3(e) and Addendum to Franchise Agreement ¶ 3(f). Debtors also are required to "supervise all collections" but they are not required to assure that all accounts receivable are collected. Id.

Starting in mid-October 2002, Debtors implemented the McKesson Software System and centralized billing. This system was implemented in the Montana Franchisees' locations in October 2002. Under that system, the Montana Franchisees' administrative staff (which are direct employees of the franchisees) enter the billing information. From this information the McKesson Software System generates a bill, which the Debtors review for plain errors. In the

event of an error, the bill is sent to the Montana Franchisees for reconciliation. Once the error is rectified, the bill is transmitted to the client or payor. Geary Decl. ¶ 3.

The Montana Franchisees assert that “some bills” were billed inaccurately and “others” were not billed at all. There is no specificity in the Hawley affidavit. However, to the extent this actually occurred, it is likely caused by the Montana Franchisees’ administrative staff as they input the billing information directly into the McKesson Software System. Because the Montana Franchisees failed to provide any specific instances of billing errors, Debtors are unable to refute these allegations. That being said, Debtors have always addressed the Montana Franchisees’ billing concerns. Id. In the rare instance that the error was caused by Debtors, the Montana Franchisees have been credited with the billing. Id.

The Montana Franchisees also assert that some bills were billed accurately and collected but the billing software did not account for the payment. Debtors are aware of a software programming problem in the McKesson Software System that sometimes causes a posting to an account to be reflected in another account. Id. Debtors’ software provider, McKesson, has not issued a fix for this bug. Id. Debtors have taken steps to work around this problem by manually addressing any posting errors. Id. Debtors are unaware of any posting error that the Montana Franchisees have raised that has not been resolved. Id. Indeed, they have cited to no specific instance where collections were misapplied.

Finally, the Montana Franchisees assert that they are entitled to a “refund on all accounts placed in bad debt that are not bad debt.” Hawley Aff. ¶9(C). As described in greater detail above, the Franchise Agreements provide that Debtors must only “supervise all collections.”

Indeed, collection must be a joint effort of both Debtors and the Montana Franchisees.⁴ Geary Decl. ¶ 2. Nonetheless, Debtors have diligently collected on Montana Franchisees' accounts. The average days outstanding for a Montana Franchisees' bill is in the mid-forties while it is sixty-five to seventy-five days for the home care industry in general and approximately sixty days for the Debtors' organization as a whole. Id. at ¶ 3. In the event that a debt was not collected based upon an oversight by Debtors, they assumed 100% of the loss. Id.

Debtors have also operated in accordance with the detailed bad debt scheme as set forth in the Franchise Agreements. Because the payments to the Montana Franchisees are based upon gross sales and not collections, this scheme is integral to the structure of the Franchise Agreements. The Franchise Agreements provide that all bills not collected after 113 days shall be deducted from future advances to the Montana Franchisees. Franchise Agreement ¶ 5(j). Finally, the Debtors are unaware of any specific issues with respect to the classification of bad debts; however, there have been numerous accounts which the Montana Franchisees have directed Debtors not to collect, which have been deducted from the remittances to the Montana Franchisees as bad debt. Geary Decl. ¶ 3.

4. Payment to franchisees

The Montana Franchisees assert that Debtors have breached the Franchise Agreements by not paying the remaining gross profits by wire transfer on Monday after the end of each period. Hawley Aff. ¶ 9(D). The Franchise Agreements provide that the Debtors shall remit the remaining gross profits "as soon as practicable after each period ends." Franchise Agreement ¶ 5(h). The Debtors have never sent this payment to the Montana Franchisees by wire transfer; rather, the Debtors have made this payment by check which is sent via Federal Express on the

⁴ Among other duties, the Montana Franchisees are required to solicit customers and meet certain minimum billing requirements. Franchise Agreement ¶ 8(c) and Schedule D.

Tuesday following two weeks after the close of the period. On three occasions, which followed the filing of petitions for relief in these cases, this payment was delayed. Since then, the Debtors have resumed sending checks via Federal Express for delivery as done in the past. Lamoreaux Decl. ¶¶ 4(D), 4(K).

5. Forms

The Montana Franchisees assert that they have been unable to obtain the necessary operating forms and have had to copy timesheets and other forms. Hawley Aff. ¶9(E). Under the Franchise Agreements, Debtors are to provide the Montana Franchisees with certain required forms. Franchise Agreement ¶ 3(o). The Montana Franchisees have the option to purchase other materials at the then-current catalog prices. Id. All of Debtors' offices, whether company-owned or franchised, are authorized to order operating forms including timesheets, nursing notes, and other forms from Debtors' form supplier. Von Arx Decl. ¶ 9(E). In fact, the Montana Franchisees have ordered in excess of \$25,000 worth of operating forms at Debtors' expense. Id. Not until the present motion were Debtors made aware of any issues that the Montana Franchisees have had in obtaining the necessary forms and the Debtors have never demanded that the Montana Franchisees pay separately for operating forms. Id.

6. Sales and promotional programs

The Montana Franchisees assert that the Debtors have never developed sales and promotional programs. Hawley Aff. ¶9(F). The Franchise Agreements provide that Debtors shall develop "sales and promotional programs to assist you [Montana Franchisees] in your efforts to generate more business and increase the sales of the franchise." Franchise Agreement ¶ 3(l). Debtors have developed and implemented national sales and promotional programs. Unsworn Declaration of Dennis Patrick ("Patrick Decl.") ¶ 2; Unsworn Declaration of Lisa Weber ("Weber Decl.") ¶ 2. The Montana Franchisees were invited to participate in all

programs and have participated in some of these programs. Id. Specifically, representatives traveled throughout the country in February 2002 to implement the roll-out of Debtors' standardized trade name – Intrepid USA Healthcare Services. Id. In 2003, Debtors utilized a 12-month marketing plan that provided each location, including the Montana Franchisees, with marketing manuals and the use and distribution of promotional items. Id. Moreover, the Montana Franchisees had and continue to have access to all promotional items offered to every one of Debtors' locations, whether company owned or franchised. Id. Finally, the Montana Franchisees have been invited to participate in a marketing program beginning in October and have indicated they intend to participate. Id.

7. Publicity and direct mailing

The Montana Franchisees assert that the Debtors have not publicized their trade name and conducted direct mailings. Hawley Aff. ¶9(G). The Franchise Agreements provide that Debtors shall publicize their trade name and conduct direct mailings of promotional materials at Debtors' "discretion." Franchise Agreement ¶3(m). Thus, the Franchise Agreements do not compel Debtors to publicize their trade name or conduct direct mailings. Because of the Debtors' focus on developing local relationships and the little benefit gained compared to the expense, Debtors have determined that direct mailings are not in the best interest of the company and franchisee locations. Weber Decl. ¶ 3. However, as set forth in greater detail above, Debtors have implemented a nationwide marketing campaign publicizing their trade name.

8. Community education

The Montana Franchisees assert that the Debtors have not conducted any community education programs. Hawley Aff. ¶ 9(H). The Franchise Agreements do not require the Debtors to conduct community education programs; rather, provides that the Debtors shall "assist you [Montana Franchisees] with community education." Addendum to Franchise Agreement ¶3(g)

(emphasis added). The Montana Franchisees have never requested any assistance in conducting community education programs. Indeed, they have not even alleged that they have in the present motion. Weber Decl. ¶ 4; Patrick Decl. ¶ 2; Von Arx Decl. ¶ 9(H).

9. Branch manager training

The Montana Franchisees assert that the Franchise Agreements require the Debtors to conduct classes for new branch managers. Hawley Aff. ¶9(I). To the contrary, the Franchise Agreements do not require the Debtors to offer branch manager classes. Indeed, the Montana Franchisees have not identified any such provision in the Franchise Agreements. Nonetheless, Debtors did determine that it would be beneficial to provide Branch Manager General Orientation, whereby Debtors would train regional and branch managers and other key employees. Weber Decl. ¶ 5. The Montana Franchisees were invited to and did participate in this training. Id. In fact, Jan Hawley and Kris Carlson attended this training. Id. All the attendees were provided with information and materials necessary to train new employees. Id. In addition, an on-site orientation was provided for a new branch manager in Bozeman, Montana. Id.

10. Medicare-consulting

The Montana Franchisees assert that the Franchise Agreements require Debtors to provide consulting prior to all Medicare surveys and that Debtors have failed to provide such consulting. Hawley Aff. ¶9(J). To the contrary, the Franchise Agreements do not require Debtors to provide pre-Medicare survey consulting. Moreover, the Montana Franchisees did not hold Medicare certification until January 2002 and the location owned and operated by the Hawleys has never been Medicare certified. Weber Decl. ¶ 6. Finally, the Debtors cannot provide Medicare-survey consulting to the Montana Franchisees as typically all but the initial accreditation survey are unannounced.

Nonetheless, Intrepid has provided Medicare-survey consulting to the Montana Franchisees. Id. At least four different people from Debtors' corporate offices traveled to Montana on at least three separate occasions after the Montana Franchisees acquired Medicare certification in January 2002 to provide Medicare and other compliance consulting and training. Id. As a result of these visits, a detailed action plan was developed to assist the Montana Franchisees in maintaining compliance with Medicare rules and regulations. Id.

11. Post-petition payments to franchisees

The Montana Franchisees assert that the Debtors have paid every post-petition payment late and that detailed accounting has been withheld. Hawley Aff. ¶ 9(K). As described in detail above, the Franchise Agreements do not require that such payments be made on the Monday following the close of the period. Rather, they provide that the payments should be made "as soon as practicable" at the close of each period. Franchise Agreement ¶5(b). Transmitting checks via Federal Express on the Tuesday following two weeks after the end of the period is in compliance with this provision. Lamoreaux Decl. ¶ 4(K). These payments are calculated and transmitted before the Debtors even close the books for their company-owned locations. Moreover, only three payments that immediately followed the filing of the Chapter 11 petition were late and all subsequent payments have been made in accordance with the Debtors' pre-petition practices.

Finally, the Debtors have not reduced the financial information provided to the Montana Franchisees. Id. In fact, the Montana Franchisees are emailed a summary of the accounting and a detailed trial balance that sets forth each billing transaction underlying the payment. Id. In addition, the data underlying the accountings is available to the Montana Franchisees through the McKesson Software System to which they have remote access. Id.

C. The Franchise Agreements Are Vital To The Debtors' Reorganization.

The Franchise Agreements are important to Debtors' reorganization. The Franchise Agreements provide the Debtors with a steady stream of cash flow. The collections from the Montana Franchisees totaled \$6.8 million in 2003 and \$4.4 million to date in 2004. Geary Decl. ¶ 3. The Debtors are entitled to 8% of the gross sales every four weeks. Franchise Agreement ¶ 5(d). Relinquishing this cash flow would hinder Debtors' reorganization efforts. Moreover, the Franchise Agreements increase the value of the Debtors' estates in less direct means as the franchise relationship enables the Debtors to expand their territory and promotes recognition of their trade name.

The Franchise Agreements contain buy-out provisions permitting the franchisees to buy out their rights. Franchise Agreement ¶ 11(a). The provision requires the Montana Franchisees to pay to Debtors the sum total of the compensation – 8% of the gross sales – over the last twenty-six months. This amount totals approximately \$1.2 million. Lamoreaux Decl. ¶ 5. Despite those rights, Debtors have negotiated with the Montana Franchisees since the filing to permit a buyout for a greatly reduced amount. The parties have so far been able to come to an agreement. Unsworn Declaration of Ryan T. Murphy ("Murphy Decl.") ¶ 2.

D. The Debtors Have Not Had Sufficient Time To Appraise Their Financial Situation And The Potential Value Of Their Assets Including The Franchise Agreements In Formulating Plans.

As described in greater detail in Debtors' motion to extend the exclusivity periods (Docket No. 407), the Debtors need additional time to appraise their financial situation and the potential value of their assets in formulating plans. This is due to the size and the complexity of the cases. The Debtors' cases are large; there are 68 Debtors who collectively generate \$180,000,000 in revenue and have hundreds of creditors. The usual difficulties associated with cases of this collective size have been compounded by the complexity of the cases. Initially, the

Debtors were consumed with the exigencies that surrounded their cases, and only recently have begun to negotiate with parties-in-interest in these cases including DVI, CMS, the DIP lender and the Creditors' Committee regarding plans of reorganization. Moreover, the Debtors need additional time to resolve certain contingencies including to evaluate their businesses to determine how to maximize the value of the estates. This may include selling and/or closing certain offices, and entering into a recapitalization plan, sale of assets, or similar external transaction. The decision whether to assume or reject the Franchise Agreements must be made in the context of such an external transaction. Because the Debtors are not yet prepared to make a definitive decision as to such an external transaction, they need additional time to evaluate whether to assume or reject the Franchise Agreements.

E. The Court Has Extended the Exclusivity Periods.

The Montana Franchisees assert that the exclusivity periods have been terminated. Montana Franchisees' Memorandum at 4. To the contrary, on September 9, 2004, the Court entered an order extending the exclusive period to file plans through December 8, 2004 and the exclusive time to obtain acceptances of these plans through February 7, 2005. Docket Number 465.

F. Conclusion.

As demonstrated above, the Montana Franchisees fail to show that any of the factors require reducing the time in which Debtors have to assume or reject the Franchise Agreements. Therefore, this Court should deny the relief sought by the Montana Franchisees in all respects.

II. SHOULD THE COURT REDUCE THE TIME IN WHICH DEBTORS HAVE TO ASSUME OR REJECT THE FRANCHISE AGREEMENTS, THE DEBTORS MUST BE PROVIDED WITH AN OPPORTUNITY TO DETERMINE THE CURE AMOUNT AND MAKE AN INFORMED BUSINESS DECISION IN LIGHT OF THAT AMOUNT.

Should the Court reduce the time in which the Debtors have to assume or reject the Franchise Agreements, the issues underlying this matter cannot be resolved by September 30, 2004. The Montana Franchisees have submitted no evidence in support of their claims and damages, but rather only vague assertions. On September 17, 2004, Debtors served discovery requests on the Montana Franchisees to discern the specific facts underlying their allegations and the calculations underlying their asserted damages. Murphy Decl. ¶ 3. At the conclusion of discovery, the parties will need to schedule an evidentiary hearing in order for the Court to determine the amount of the cure. Such an evidentiary hearing will require adequate notice to the parties-in-interest. Moreover, following this Court's determination as to the amount of the cure, the Debtors will need time to analyze whether it is in the interests of their estates and creditors to assume or reject the Franchise Agreements in light of the amount of the cure. Therefore, should the Court reduce the time to assume or reject the Franchise Agreements, the Debtors request that they be afforded at least sixty days to make such a determination.

CONCLUSION

In sum, Debtors respectfully request that the Court deny the relief sought by the Montana Franchisees in all respects. Should the Court reduce the time in which Debtors have to assume or reject the Franchise Agreements, the Debtors respectfully request that they be given adequate

time to determine the amount of the cure and make an informed business judgment as to whether to assume or reject the Franchise Agreements in light of that cure amount.

Dated: September 17, 2004

/s/ Ryan T. Murphy

Clinton C. Cutler (#158094)

Ryan T. Murphy (#311972)

FREDRIKSON & BYRON, P.A.

200 South Sixth St., Suite 4000

Minneapolis, MN 55402

Telephone 612-492-7000

ATTORNEYS FOR DEBTOR

#3016787\1

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11 Bankruptcy

Intrepid U.S.A., Inc.,
and Jointly Administered Cases,

Case No. 04-40416-NCD

Case No. 04-40462-NCD

Case No. 04-40418-NCD

Debtors

Case Nos. 04-41924 – 04-41988-NCD

**UNSWORN DECLARATION OF GREGORY VON ARX IN RESPONSE TO
MONTANA FRANCHISEES' MOTION REGARDING FRANCHISE AGREEMENTS**

Gregory Von Arx states under penalty of perjury as follows:

1. I am the Chief Financial Officer of Intrepid U.S.A., Inc. and its affiliated Debtors, and as such have personal knowledge of the facts set out herein. I have been employed as Intrepid's Chief Financial Officer since May 1998, prior to the time that Intrepid acquired the Montana Franchisees. I have reviewed the Affidavit of Janet Hawley and Allen Hawley (the "Hawley Affidavit") and offer this Unsworn Declaration in response to the allegations contained therein.

2. The Montana Franchisees became franchisees of Western Medical Services, Inc., a California corporation ("Western Medical"), some time prior to Intrepid's acquisition of Western Medical's assets as of August 9, 1999. The Franchise Agreements with the Montana Franchisees were included as assets acquired from Western Medical; however, at the time of the acquisition, the Montana Franchisees consisted of only two (2) offices, Billings (Yellowstone County) and Kalispell (Flathead County). Debtor Intrepid Affiliates, Inc. is the franchisor under those Franchise Agreements.

3. In January 2002, Intrepid was offered an opportunity to acquire an existing home health agency business operating in Montana. In accordance with the terms of the Franchise Agreements with the Montana Franchisees, Intrepid offered to the Montana Franchisees an opportunity to participate in the purchase and the Montana Franchisees accepted such offer. Since that time, the additional Montana offices which were the subject of that acquisition have been operated in accordance with the terms of the Franchise Agreements.

4. With respect to the allegations in Paragraph 4 of the Hawley Affidavit, Intrepid is entitled to payment of a service fee equal to eight percent (8%) of gross sales as well as reimbursement for the amounts Intrepid pays on behalf of the franchised locations during each four-week period. As a practical matter, the Franchise Agreement requires Intrepid to give the Montana Franchisees credit and payment for amounts billed during each 4-week period, *whether or not Intrepid has yet collected the amounts billed*. In essence, Intrepid is advancing funds to the Montana Franchisees prior to receipt of payment for those amounts on a regular basis. The Franchise Agreements require that Intrepid remit to the Montana Franchisees the remaining balance "as soon as practicable" after the end of each four-week period.

5. With respect to the allegations in Paragraph 5 of the Hawley Affidavit, it is a misrepresentation that Intrepid began "dismantling" the franchise business upon acquisition in August 1999. As the Montana Franchisees are well aware, within a few months after Intrepid's acquisition of the franchised businesses from Western Medical, the Montana Franchisees banded together with the other franchisees and licensees acquired from Western Medical and threatened to sue Intrepid and/or unilaterally terminate the agreements with Intrepid should Intrepid not agree to the franchisees and licensees demands. The acquired business was losing substantial amounts of money and Intrepid contemplated the 8% franchise fee as the major source of funds

until the turnaround of the owned offices could be completed. It was as a result of these threats and the crippling effect that it would have had on Intrepid's business at that time that a substantially discounted buy-out price was "offered" to the franchisees and licensees. It is true that the Montana Franchisees determined to not accept those buy-out terms.

6. With respect to the allegations in Paragraph 6 of the Hawley Affidavit, there is no basis for the assertion that Debtors reduced the services it provided under the Franchise Agreements. Intrepid had only been operating as the franchisor for a few months when the Montana Franchisees and others threatened to cripple Intrepid's business. One of the "complaints" of the Montana Franchisees in 1999 was that Intrepid provided the services as required by the Franchise Agreements but did not provide additional services not specifically provided for in the agreements as Intrepid's predecessor had done. The Montana Franchisees cannot now assert that adhering to the terms of the Franchise Agreements is a "substantial, material and continuing default under the Franchise Agreements" when they waived those claims five years ago when they determined to continue as franchisees.

7. With respect to the allegations contained in Paragraph 7 of the Hawley Affidavit, Intrepid was and continues to be unable to pay the amounts from April 2004 because those amounts constitute pre-petition debt of the Debtors. When the checks were first issued to the Montana Franchisees in April 2004, the bank account on which those checks were issued was open. Upon the April 12, 2004, bankruptcy filing, Intrepid did close its existing bank accounts and opened new debtor-in-possession bank accounts as required, but the Montana Franchisees were not harmed by that action because they could not have retained the pre-petition amounts mistakenly sent to them in April 2004.

8. With respect to Paragraph 8 of the Hawley Affidavit, as stated above, Intrepid is currently precluded from paying the Montana Franchisees any pre-petition amounts so it is unclear to me how that can be a breach of the Franchise Agreement.

9. With respect to Paragraph 9 of the Hawley Affidavit,

A. Workers' Compensation Coverage: Intrepid is entitled to be compensated for the direct labor costs incurred by it, including workers' compensation. The Montana Franchisees indicate that they have obtained a quote for workers' compensation insurance of \$7.56 per \$1,000 of payroll. It is curious that no documentary evidence is provided by the Montana Franchisees regarding this quote. Based upon the information made available to Intrepid, the rate cited in the Hawley Affidavit is merely the State of Montana rate for a particular job code; it does not account for any MOD factor or other rate adjustments based upon claims history. The Debtors have a self-funded workers' compensation plan. We calculate each Intrepid location's workers' compensation costs consistently regardless of whether the location is company-owned or franchised: We multiply each respective State rate by the MOD factor as published by the National Council on Compensation Insurance ("NCCI") and as provided by the Debtors' workers' compensation broker, and charge each office its respective amounts. For the Montana Franchisees this is a 1.9 MOD factor. Contrary to their assertions, the Montana Franchisees have benefited from this methodology. Currently the Montana Franchisees are 4-5% of total payroll, yet they account for 22-25% of the losses paid for workers' compensation claims submitted. In reality, the cost to Intrepid for the Montana Franchisees' share of the premium amounts plus the expected amounts for losses paid on behalf of their agencies exceeds the amounts that Intrepid is reimbursed from the Montana Franchisees anywhere from \$250,000 - \$860,000 depending upon whether the Montana Franchisees' share of the premium is based on

percentage of payroll or percentage of claims paid. I doubt that the Montana Franchisees could find workers' compensation insurance for less than what they are benefiting from by participating on Intrepid's self-funded plan. We have offered them to go onto their own policies or the Montana State Fund if they could find a less expensive policy, but they continue participating on Intrepid's plan. The Montana Franchisees have been provided with their loss runs. This Paragraph contains another misrepresentation of the Montana Franchisees as the Debtors have never been sued by anyone named "Tom Ruppert" or any entity owned by or associated with anyone by that name.

B. Liability Insurance: The Franchise Agreements also allow Intrepid to be compensated for the liability insurance costs incurred by it. Intrepid charges each location, whether company-owned or franchised, a consistent amount. This is the practice that was started by Intrepid's predecessor to the Franchise Agreements with the Montana Franchisees, and Intrepid has continued that practice utilizing the same 1.5 percent of payroll costs calculation. There is no invoice or other documentation showing a premium amount broken out by office as all Intrepid locations are covered by the policy. The Montana Franchisees are well aware of what coverage exists as all Intrepid locations are provided with evidence of insurance to provide to their various clients. Moreover, if required by a particular contract, specific certificates of insurance are requested and provided in accordance with the contract, a copy of which is provided to the Montana Franchisees. The remainder of this Paragraph in the Hawley Affidavit is filled with their "beliefs" and other blanket statements without any underlying support, and it is impossible for me to respond.

C. Billing Problems: It is my understanding these allegations are addressed in the Affidavit of Thomas Geary.

D. Payment to Franchisees: It is my understanding that these allegations are addressed in the Affidavit of Don Lamoreaux. To my knowledge, the Debtors have never remitted the franchisee's payments via direct deposit or wire transfer. Moreover, remittances to the franchisees are sent via Federal Express either directly to the franchisees or to the franchisees' banks in accordance with instructions provided by the franchisees.

E. Forms: It is untrue that the Montana Franchisees have been denied access to operating forms. All Intrepid locations, whether company-owned or franchised, are authorized to order necessary operating forms, including time sheets and nursing notes, from Intrepid's forms supplier. The Montana Franchisees have, in fact, ordered in excess of \$25,000 worth of operating forms at Intrepid's expense. Intrepid is unaware of any issues the Montana Franchisees have had in obtaining the necessary forms. The Debtors have never "demanded" that the Montana Franchisees pay separately for operating forms.

F. Sales and Promotional Programs: The Montana Franchisees have been offered an opportunity to participate in any sales and promotional programs utilized throughout the Intrepid organization.

G. Publicity and Direct Mail: Intrepid has publicized its trade names and conduct direct mailings in its discretion as allowed by Paragraph 3m of the Franchise Agreement. It is not required to do so as alleged by the Montana Franchisees, and it is a misstatement to say that Debtors have never done so since August 1999. Intrepid conducted a campaign across the United States in 2002 when it integrated all of its locations, including the Montana Franchisees, under one common name "Intrepid USA Healthcare Services".

H. Community Education: To my knowledge, the Montana Franchisees have never requested assistance with any "community education".

I Branch Manager Training: There is nothing in the Franchise Agreements which requires Intrepid to provide training to new branch managers hired by the Montana Franchisees. It should also be noted that Paragraph 3a of the Franchise Agreement attached as Exhibit A to the Hawley Affidavit and relating to office manager training was specifically stricken from the Franchise Agreement.

J. Consulting: There is no specific requirement in the Franchise Agreements requiring any pre-Medicare survey consulting. In fact, the Montana Franchisees were not even Medicare certified until January 2002 with the acquisition of the new offices at that time.

K Post-Petition Payments to Franchisees: It is my understanding these allegations are addressed in the Affidavit of Don Lamoreaux.

10. It should be noted that the Debtors have attempted to work with the Montana Franchisees to ensure that the franchise relationship between the parties can be a mutually beneficial one. As an example, the Montana Franchisees determined to operate a non-medical supplemental staffing business outside the scope of the Franchise Agreements; specifically the Montana Franchisees were staffing industrial workers such as roofers and those providing transportation services. These employees fall outside of the classes of employees covered by the Debtors' workers' compensation insurance, so the Debtors acquired a separate policy to ensure that this additional aspect of the Montana Franchisees' business would have adequate insurance coverage. In addition, the Hawleys are not currently operating their franchised business as a corporation as required by the Franchise Agreement, and one of the corporate names for Kris Carlson's franchised business does not comply with the requirements of the Franchise Agreements. In the interest of maintaining a mutually beneficial franchise relationship, the

Debtors have, to date, refrained from threatening significant disruption to the Montana Franchisees' businesses as a result of these breaches of the Franchise Agreements

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: September 17, 2004



Gregory Von Arx

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11 Bankruptcy

Intrepid U.S.A., Inc.,
and Jointly Administered Cases,

Case No. 04-40416-NCD

Case No. 04-40462-NCD

Case No. 04-40418-NCD

Debtors

Case Nos. 04-41924 – 04-41988-NCD

**UNSWORN DECLARATION OF DENNIS PATRICK IN RESPONSE TO MONTANA
FRANCHISEES' MOTION REGARDING FRANCHISE AGREEMENTS**

Dennis Patrick states under penalty of perjury as follows:


1. I am the Executive Director, Marketing of Intrepid U.S.A., Inc. and its affiliated Debtors, and as such have personal knowledge of the facts set out herein. I have reviewed the Affidavit of Janet Hawley and Allen Hawley (the "Hawley Affidavit") and offer this Unsworn Declaration in response to the allegations contained therein.

2. With respect to Paragraphs 9F, 9G and 9H of the Hawley Affidavit, Intrepid has developed and implemented national sales and promotional programs. The Montana Franchisees were invited to and did participate in these programs. Intrepid representatives traveled throughout the country in February 2002 to implement the roll out of Intrepid's standardized trade name "Intrepid USA Healthcare Services". The Montana Franchisees were invited to participate in these roll-out sessions but declined to do so. Intrepid has provided the Montana Franchisees with a marketing manual, and the Montana Franchisees have access to all promotional items offered to every Intrepid location. While in Minnesota, the Montana Franchisees were provided a marketing bag containing samples of various marketing products available. In fact, the Montana Franchisees have ordered Intrepid USA Healthcare Services

marketing products for their locations. When Intrepid determines to order marketing products for all locations, the Montana Franchisees are contacted in advance so that they can either accept or decline participation in an "auto-ship" so they control the marketing costs for their locations. The Montana Franchisees participate in the bi-weekly marketing training conference calls held by the Debtors. In addition, they have been invited to participate in a new marketing program to begin October 2004, and they have indicated that they intend to participate. Unlike other offices, the Montana Franchisees were provided with a specially designed file of the Intrepid logo so that they could utilize it to order embroidered clothing for their locations. The Montana Franchisees have not requested any assistance with any community education.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: September 17, 2004


Dennis Patrick

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11 Bankruptcy

Intrepid U.S.A., Inc.,
and Jointly Administered Cases,

Case No. 04-40416-NCD

Case No. 04-40462-NCD

Case No. 04-40418-NCD

Debtors

Case Nos. 04-41924 – 04-41988-NCD

**UNSWORN DECLARATION OF LISA WEBER IN RESPONSE TO MONTANA
FRANCHISEES' MOTION REGARDING FRANCHISE AGREEMENTS**

Lisa Weber states under penalty of perjury as follows:

1. I am the Executive Director, Operations of Intrepid U.S.A., Inc. and its affiliated Debtors, and as such have personal knowledge of the facts set out herein. I have reviewed the Affidavit of Janet Hawley and Allen Hawley (the "Hawley Affidavit") and offer this Unsworn Declaration in response to the allegations contained therein.
2. With respect to Paragraph 9F of the Hawley Affidavit, Intrepid has developed and implemented numerous national sales and promotional programs, in which the Montana Franchisees are invited to participate although they do not always choose to accept the invitation. Intrepid has provided the Montana Franchisees with a marketing manual, and the Montana Franchisees have access to all promotional items offered to every Intrepid location.
3. With respect to Paragraph 9G of the Hawley Affidavit, as mentioned above, Intrepid implemented a nationwide campaign and marketing of its trade name in 2002. The Franchise Agreement does not require Intrepid to conduct direct mailing. Intrepid's sales efforts are focused on establishing relationships within the local markets, and because of the little

benefit gained when compared to the expense, Intrepid has determined that direct mailing is not in the best financial interest of the company.

4. With respect to Paragraph 9H of the Hawley Affidavit, as previously mentioned, Intrepid has provided sales, promotional, and marketing support to the Montana Franchisees. The Montana Franchisees have not requested assistance with any community education programs.

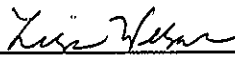
5. With respect to Paragraph 9I of the Hawley Affidavit, the Franchise Agreement does not require that Intrepid provide individual training to each branch manager every time a new employee is hired. Notwithstanding, Intrepid did determine that it would be beneficial to all locations to provide Branch Manager General Orientation training to branch managers, regional managers, and other key employees. The Montana Franchisees participated in Intrepid's Branch Manager General Orientation training program. All attendees were provided with the information and materials necessary to train new employees within their geographic areas as new employees were hired because Intrepid utilizes a "train the trainer" methodology. In addition, an on-site orientation was provided for a new branch manager in Bozeman, Montana. Two of Intrepid's Corporate Service Center employees traveled to Montana to visit this branch manager in the Fall of 2003. At the same time, these Corporate Service Center employees assisted the Montana Franchisees in rolling out the Debtors' required CIA training.

6. In response to Paragraph 9J of the Hawley Affidavit, the Franchise Agreement does not require Intrepid to provide pre-Medicare survey consulting. In fact, the Montana Franchisees did not hold Medicare certification until January 2002; however, the location owned and operated by the Hawleys is not Medicare certified today nor has it been Medicare certified at any time while the Hawleys have been a franchisee of Intrepid. Contrary to the allegations in the

Hawley Affidavit, at least four different people from Intrepid's corporate offices traveled to Montana on at least three separate occasions after the Montana Franchisees acquired Medicare certification in January 2002 to provide Medicare and other compliance consulting and training. I traveled to Montana with a compliance specialist from November 4-8, 2002, to evaluate current Medicare operations for home health care and hospice of the Helena, Montana location and its branch offices to insure that the agency was in compliance with Medicare Conditions of Participation and other applicable regulations. As a result of that visit, a detailed action plan was developed to assist the Montana Franchisees in maintaining compliance with Medicare rules and regulations. In addition to the visits in Montana, both Jan Hawley and Kris Carlson traveled to Minnesota sometime after January 2002 and were provided with a Medicare orientation, which included orientation relating to operating a hospice. Typically, with the exception of the initial certification survey, all State and Medicare surveys are unannounced.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: September 17, 2004



Lisa Weber

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11 Bankruptcy

Intrepid U.S.A., Inc.,
and Jointly Administered Cases,

Case No. 04-40416-NCD
Case No. 04-40462-NCD
Case No. 04-40418-NCD

Debtors

Case Nos. 04-41924 – 04-41988-NCD

**UNSWORN DECLARATION OF THOMAS GEARY IN RESPONSE TO MONTANA
FRANCHISEES' MOTION REGARDING FRANCHISE AGREEMENTS**

Thomas Geary states under penalty of perjury as follows:

1. I am a Controller of Intrepid U.S.A., Inc. and its affiliated Debtors, and as such have personal knowledge of the facts set out herein. I oversee Intrepid's billing, collections and cash application departments. I have reviewed the Affidavit of Janet Hawley and Allen Hawley (the "Hawley Affidavit") and offer this Unsworn Declaration in response to the allegations contained therein.

2. In response to Paragraph 4 of the Hawley Affidavit, it is not accurate to say that Intrepid collect ALL of the revenues. The Franchise Agreement states that Intrepid supervises the collection efforts, but Intrepid and the Montana Franchisees have historically and must work together to collect the accounts owing. In addition, the Montana Franchisees do indicate to Intrepid which private pay and supplement staffing accounts should not be worked by Intrepid but instead are the exclusive responsibility of the Montana Franchisees.

3. With respect to Paragraph 9C of the Hawley Affidavit, because of the lack of detail contained in the Paragraph it is difficult to respond to the allegations made. The Montana Franchisees joined the Intrepid system in August 1999, and there was no change in billing

packages at the beginning of 2002, so I cannot determine what the Montana Franchisees are discussing in that allegation. Intrepid made a determination to change its billing package in 2002 so that all Intrepid locations would be utilizing the same billing package and to better consolidate billing at Intrepid's Corporate Service Center in Edina, Minnesota. Prior to that time, there were at least three (3) different systems being utilized depending upon which acquisition a particular location was associated with. If there are bills that are inaccurate, that would be as a result of incorrect data entered at the offices operated by the Montana Franchisees as the internal staff of the Montana Franchisees (not employees of Intrepid) are responsible for entering the data which generates the invoices, but I am unaware of inaccurate billing issues. Prior to Intrepid sending the bills to the accounts, Intrepid reviews those bills for plain errors but would not have the underlying documentation to conduct a detailed billing audit. If plain errors are discovered, the bill is sent to the Montana Franchisees for correction/reconciliation before it is sent to the account. I am also unaware of any issues with invoices not being billed at all. Again, without any details provided by the Montana Franchisees, it is difficult to respond to the allegations with any specificity. I am aware of some issues relating to amounts that were not collected because issues were not addressed within the time limits set by the payor. In those instances, if the lack of follow up was the fault of Intrepid, Intrepid assumed one hundred percent (100%) of the loss. Most of these issues occurred since the Montana Franchisees transitioned to Intrepid's new billing software in the Fall of 2002, and since that time, Intrepid has taken one hundred percent (100%) responsibility for \$15,829. It should be noted that this is a mere percentage of total billings for the Montana Franchisees during that time period, demonstrating that this issue is not as material as the Montana Franchisees allege in the Hawley Affidavit. In 2003, the billings for the Montana Franchisees were \$6,400,000 (4.5% of Intrepid's total billing) with collections of

\$6,800,000 (5.1% of Intrepid's total collections). To date in 2004, billings are \$4,700,000 (4.1% of Intrepid's total billing) with collections of \$4,400,000 (4.4% of Intrepid's total collections). Cash receipts for the billings are remitted to Intrepid's lockboxes and those payments are posted to the system at Intrepid's Corporate Service Center. There is a glitch in the billing software currently utilized by the Debtors which sometimes causes a posting to an account to be reflected on another account, but the fix for this issue has not yet been released by the software company. The Debtors have taken steps to work around this problem and to manually address any posting errors. It is true that in accordance with the Franchise Agreement, if an account is not collected after 113 days, it is classified as bad debt with adjustments made to the gross profit amount remitted to the Montana Franchisees. However, this "collection issue" is not the Debtors' "problem" as alleged by the Montana Franchisees. The Franchise Agreements state that Intrepid will supervise collection of accounts, but the collection of accounts is the joint effort of Intrepid and the Montana Franchisees. There have been numerous accounts which the Montana Franchisees have directed Intrepid to not collect against and some of these accounts are those which have been written off as bad debt. To my knowledge, there has not been any damage caused to the Montana Franchisees by the allegations contained in this paragraph. In fact, as evidence that Intrepid does expend much effort on the billing and collection of the Montana Franchisees' account, the average DSO for the Montana Franchisees is in the mid-40s while it is 65-75 days for the home care industry and approximately 60 days for the Intrepid organization as a whole.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief

Dated: September 17, 2004


Thomas Geary

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11 Bankruptcy

Intrepid U.S.A., Inc.,
and Jointly Administered Cases,

Case No. 04-40416-NCD

Case No. 04-40462-NCD

Case No. 04-40418-NCD

Debtors

Case Nos. 04-41924 – 04-41988-NCD

**UNSWORN DECLARATION OF DON LAMOUREUX IN RESPONSE TO MONTANA
FRANCHISEES' MOTION REGARDING FRANCHISE AGREEMENTS**

Don Lamoureux states under penalty of perjury as follows:

1. I am a Controller of Intrepid U.S.A., Inc. and its affiliated Debtors, and as such have personal knowledge of the facts set out herein. I oversee the accounts payable, payroll and accounting departments of Intrepid, including the franchisee remittances. I have reviewed the Affidavit of Janet Hawley and Allen Hawley (the "Hawley Affidavit") and offer this Unsworn Declaration in response to the allegations contained therein.

2. With respect to the allegations contained in Paragraph 7 of the Hawley Affidavit, Intrepid was and continues to be unable to pay the amounts from April 2004 because those amounts constitute pre-petition debt of the Debtors. Intrepid did close its existing bank accounts and opened new debtor-in-possession bank accounts in April 2004, but the Montana Franchisees were not harmed by that action because they could not have retained the pre-petition amounts mistakenly sent to them in April 2004.

3. With respect to Paragraph 8 of the Hawley Affidavit, as stated above, Intrepid is currently precluded from paying the Montana Franchisees any pre-petition amounts so it is unclear to me how that can be a breach of the Franchise Agreement. The Montana Franchisees

do not specify how they calculated the amounts they are claiming they are owed, so it is impossible for me to respond to that allegation.

4. With respect to Paragraph 9 of the Hawley Affidavit,

D. Payment to Franchisees: To my knowledge, the Debtors have never sent remittances to the Montana Franchisees via direct deposit. Historically, the Debtors sent checks directly to the Montana Franchisees via Federal Express. Subsequently, the Hawleys' daughter who is also a franchisee in Montana requested that her checks be sent directly to her bank, and she provides the deposit slips to Debtors. The checks are prepared and sent on the Tuesday following two weeks after the end of each period. The Montana Franchisees' financial data is prepared and the amounts of the checks calculated before Intrepid has even closed the books for its company-owned locations. Because all account payments are made to Intrepid and Intrepid fronts the direct field staff and other expenses, including insurance costs, Intrepid deducts the amounts paid when calculating the remittance amounts. To my knowledge, Intrepid has provided the remittances to the Montana Franchisees consistently since it acquired these businesses.

E. Forms: I have reviewed the records Intrepid has of the types of operating forms the Montana Franchisees have been ordering since September 2003. The detail shows that the Montana Franchisees have been ordering paraprofessional and medical time slips presumably for use in their agencies. In addition the Montana Franchisees have ordered payroll envelopes, employment applications and related hiring documentation, client assessment and other client care related forms. This detail can be provided at the Court's request.

K. Post-Petition Payments to Franchisees: It is not a true statement to say that every post-petition payment to the Montana Franchisees has been late. The first post-petition payment

was late because it was necessary for Intrepid to calculate the pro rata amount for the 4-week period that could be paid as a post-petition amount. Two other post-petition payments were sent to the Montana Franchisees late while the parties attempted to resolve their differences which hinged, in part, on the payment of post-petition amounts. The Debtors have not changed the timing of the calculation of the amounts owing to the Montana Franchisees. The accounting information and detailed trial balance is sent to the Montana Franchisees via e-mail. A summary of the information provided and dates sent is attached hereto. The Debtors also have not changed the financial information provided to the Montana Franchisees. Moreover, the data underlying the accountings provided to the Montana Franchisees is available on the software systems utilized by the Debtors and is accessible to the Montana Franchisees, either directly through their own use or they are able to and do contact staff within the Debtors' various financial departments to ask questions about the information provided to them, and they are timely provided with answer to their questions.

5. The Franchise Agreements provide that should the Montana Franchisees desire to buy the franchised business, they shall pay to Intrepid an amount equal to Intrepid's 8% service fee collected over the previous 26 periods. This amount is equal to \$1,196,857.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: September 17, 2004


Don Lamoureux

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11 Bankruptcy

Intrepid U.S.A., Inc.,
and Jointly Administered Cases,

Debtors

Case No. 04-40416-NCD
Case No. 04-40462-NCD
Case No. 04-40418-NCD
Case Nos. 04-41924 – 04-41988-NCD

UNSWORN DECLARATION OF RYAN T. MURPHY

Ryan T. Murphy makes the following declaration in support of Intrepid Affiliates, Inc.'s and its affiliated entities' ("Debtors'") Objection to the Montana Franchisees' Motion:

1. I am an attorney with Fredrikson & Byron P.A. and am one of the attorneys representing Debtors in their above-referenced Chapter 11 cases.

2. The Franchise Agreements contain buy-out provisions permitting the franchisees to buy out their rights. Franchise Agreement ¶ 11(a). Despite those rights, Debtors have negotiated with the Montana Franchisees since the filing for a greatly reduced amount. The parties have so far been able to come to an agreement.

3. On September 17, 2004, I caused to be served interrogatories, document requests, and requests for admissions on the Montana Franchisees.

4. I declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information, and belief.

Dated: September 17, 2004

/s/ Ryan T. Murphy
Ryan T. Murphy

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11 Bankruptcy

Intrepid U.S.A., Inc.,
and Jointly Administered Cases,

Case No. 04-40416-NCD

Case No. 04-40462-NCD

Case No. 04-40418-NCD

Debtors

Case Nos. 04-41924 – 04-41988-NCD

CERTIFICATE OF SERVICE

Ryan T. Murphy, under penalty of perjury, states that on September 17, 2004 he caused to be served the following:

1. Debtors' Objection To Montana Franchisees' Motion (1) To Require Assumption Or Rejection Of Executory Contracts, (2) To Compel Timely Performance Under Franchise Agreements, And (3) To Grant Administrative Expense Priority For Post-Petition Amounts Due Under Franchise Agreements;
2. Unsworn Declaration of Gregory Von Arx;
3. Unsworn Declaration of Dennis Patrick;
4. Unsworn Declaration of Lisa Weber;
5. Unsworn Declaration of Thomas Geary;
6. Unsworn Declaration of Don Lamoreaux;
7. Unsworn Declaration of Ryan T. Murphy;
8. Proposed Order; and
9. Certificate of Service

by sending true and correct copies as noted on the attached Service List.

Dated: September 17, 2004

/s/Ryan T. Murphy

Ryan T. Murphy

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¹Served by Messenger

²Served by E-Mail and U.S. Mail

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11 Bankruptcy

Intrepid U.S.A., Inc.,
and Jointly Administered Cases,

Case No. 04-40416-NCD

Case No. 04-40462-NCD

Case No. 04-40418-NCD

Debtors

Case Nos. 04-41924 – 04-41988-NCD

ORDER DENYING MONTANA FRANCHISEES' MOTION

Montana Franchisees' Motion (1) To Require Assumption Or Rejection Of Executory Contracts, (2) To Compel Timely Performance Under Franchise Agreements, And (3) To Grant Administrative Expense Priority For Post-Petition Amounts Due Under Franchise Agreements came before the undersigned United States Bankruptcy Judge on _____, 2004. Appearances, if any, are noted on the record.

Based upon the arguments of counsel, all the files, records and proceedings herein, the Court being fully advised in the premises, and the Court's Findings of Facts and Conclusions of Law, if any, having been stated orally and recorded in an open court before the close of evidence:

IT IS HEREBY ORDERED:

1. The Montana Franchisees' Motion is denied.

Date: September __, 2004

United States Bankruptcy Judge